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# Antitrust and Consumerism: What is it all About?

Irving Scher

## I. INTRODUCTION

AS GEORGE GERSHWIN might have said it, it's very clear that consumerism is here to stay. President Kennedy's Charter of Consumer Rights — the rights to be heard, to be informed, to choose, and to safety — were restated by President Nixon in October

1969 as basic goals of his administration.<sup>1</sup> Not to be outdone by two Presidents, the U.S. Chamber of Commerce has added a fifth right: the right to quality and integrity in the marketplace.<sup>2</sup>

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These proclamations of consumer rights succinctly state the ideals and objectives of the consumer movement. Concerned with quality products and product information, the consumer activist demands the widest possible selection of good products at competitive prices and access to judicial redress if his demands are not met. All of this is implicitly guaranteed in the espoused rights of a consumer, but consumer spokesmen contend that disparity exists between the promise and its fulfillment.<sup>3</sup>

The consumer movement has become quite vocal and has made

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*Editor's note.*— This article is based on an address delivered by Mr. Scher at the Fourth Annual Antitrust Institute of the Ohio Bar Association on May 14, 1970. The discussion has been updated to include developments occurring on or before November 1, 1970. Since that date the 91st Congress has come to a close without passage of any of the bills discussed in the article. However, the author states that the major topics should reappear early in the 92nd Congress.

<sup>1</sup> Message from President Nixon to Congress, 115 CONG. REC. 13,471 (1969).

<sup>2</sup> CHAMBER OF COMMERCE OF THE UNITED STATES, BUSINESS-CONSUMER RELATIONS CODE (1970).

<sup>3</sup> In an appearance before the Senate Committee on Commerce, Mary Gardiner Jones, a Commissioner of the Federal Trade Commission, outlined what she considered to be the major problems of the consumer. She stressed the immediate need for product information and protection against deceptive practices. She further stressed that consumers urgently need educational programs to protect themselves and to learn what methods of redress are available. See *Hearings on H.R. 14931, H.R. 14585, H.R. 14627, H.R. 14832, H.R. 15066, H.R. 15655, and H.R. 15656 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 71 (1970)* [hereinafter cited as *Hearings on H.R. 14931*].

its presence felt nationally. In Washington, D.C., and in state capitols throughout the country, legislators on both sides of the aisle are introducing consumer protection measures, and even more can be expected next year. Businessmen are attending seminars to bring themselves up-to-date on new regulations and procedures designed to protect the consumer. Almost everyone is on the bandwagon, and anybody who criticizes the movement is roundly chastised by government, consumer spokesmen, and businessmen alike.

## II. CONSUMER PROTECTION UNDER THE ANTITRUST LAWS

One might ask, what does the subject of consumerism have to do with antitrust? Actually, quite a bit. Caspar W. Weinberger, former Chairman of the Federal Trade Commission (FTC), has emphasized the traditional role of antitrust as a bulwark of consumer protection, stating that the best form of consumer protection is a strongly competitive economy and an effective antitrust enforcement policy.<sup>4</sup> Senator Philip A. Hart, Chairman of the Senate Antitrust Subcommittee, has also stressed the importance of traditional antitrust concepts to consumerism. He recently estimated that consumers lose \$45 billion yearly because of monopoly pricing, which would amount to 8 cents of each dollar they spent in 1969.<sup>5</sup> He asserted that price-fixing conspiracies have raised consumer prices by 15 to 35 percent.<sup>6</sup> He also alleged that during a 10-year period in the State of Washington alone, consumers overpaid \$35 million for bread as a result of a price-fixing conspiracy, which, if nationwide, would have totalled \$3 billion of consumer overpayment.<sup>7</sup>

These are problems that application of traditional antitrust law can remedy. A number of consumers and consumer groups have pursued the existing antitrust remedies, as many attorneys have learned who are involved in the antitrust treble damage class actions which are now pending against drug companies and automobile manufacturers.<sup>8</sup>

Certainly, where adequate judicial redress is available to consumers, use is being made of the courts. The 1966 amendment to

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<sup>4</sup> Address by Caspar W. Weinberger before the ABA Antitrust Section, in *ANTI-TRUST & TRADE REG. REP.*, No. 457, at A-1 (April 14, 1970).

<sup>5</sup> Remarks by Senator Hart to Comm. on Priorities of the Democratic Party Council (Feb. 25, 1970).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See cases cited notes 25 & 27 *infra*.

rule 23<sup>9</sup> of the Federal Rules of Civil Procedure has greatly facilitated consumer treble damage actions under the antitrust laws. Prior to 1966 there was relatively little consumer antitrust activity<sup>10</sup> apart from the cases brought by businesses and governmental bodies in their consumer capacities. This was so despite the fact that in a very early case the Supreme Court recognized that a purchaser is injured "in his property" under the antitrust laws when he is led to pay more for a product than it is worth.<sup>11</sup>

Before the amendment to rule 23, private antitrust suits generally fell into the category of spurious class actions.<sup>12</sup> Despite such decisions as *Kainz v. Anheuser-Busch*,<sup>13</sup> wherein the Court of Appeals for the Seventh Circuit established a very liberal precedent for maintaining antitrust class actions, there were inherent difficulties involved with use of the old rule. The greatest difficulties appear to have been procedural. In the words of the Advisory Committee for the new rule, "The original rule did not squarely address itself to the question of the measures that might be taken during the course of an action to assure procedural fairness, particularly giving notice to members of the class . . ."<sup>14</sup> Another problem was that the spurious action bound *only* the joined members; those not wishing to be bound could remain outside the action.<sup>15</sup> Moreover, potential plaintiffs could remain on the periphery of the class and intervene *after* the merits had been favorably determined.<sup>16</sup> Besides these

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<sup>9</sup> FED. R. CIV. P. 23.

<sup>10</sup> ABA SECTION OF ANTITRUST LAW, ANTITRUST DEVELOPMENTS 1955-1968, at 274 (1968). In the decade preceding 1966, consumer antitrust actions showed a marked increase, but this increase was small compared to the increased number of antitrust actions in other areas.

<sup>11</sup> *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906).

<sup>12</sup> See *Comegys, The Advantages and Disadvantages of a Class Suit Under New Rule 23, as Seen by the Treble Damage Defendant*, 32 ABA ANTITRUST SECTION 271 (1966). The spurious class action was a permissive joinder device. The character of the rights sought to be enforced for or against the class were several with a common question of law or fact affecting the several rights. See 3B J. MOORE, FEDERAL PRACTICE § 23.10[1], at 23-2602, 23-2603 (2d ed. 1969). See also note 17 *infra* and accompanying text.

<sup>13</sup> 194 F.2d 737 (7th Cir.), *cert. denied*, 344 U.S. 820 (1952). In that case, the defendants argued that a spurious class action required not only common questions of law or fact, but also common relief. Acknowledging that old rule 23(a)(3) did require "common relief," the court broadly interpreted the phrase to mean "relief emanating from the same original source." *Id.* at 743. This liberal interpretation greatly enhanced the chance of plaintiffs' qualifying for spurious class actions under the old rule.

<sup>14</sup> Advisory Committee Note, 39 F.R.D. 98, 99 (1966).

<sup>15</sup> See Z. CHAFEE, SOME PROBLEMS OF EQUITY 280, 284-85 (1950). See also 3B J. MOORE, *supra* note 12, § 23.12, at 23-2913.

<sup>16</sup> *Union Carbide & Carbon Co. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1963).

procedural snarls connected with spurious class actions, courts encountered great difficulty in classifying the class actions under the three categories established in the old rule — true, hybrid, and spurious.<sup>17</sup> Confusion abounded, and injustice often went unrelieved.<sup>18</sup>

But the 1966 amendment to rule 23, which came at a time when the consumer movement was growing, has eliminated many of these problems. Procedurally, the court must now give members of the class "the best notice practicable under the circumstances," advising absent members that they will be bound by the court's determination unless they request exclusion by a specified date.<sup>19</sup> Substantively, the requirement under the old rule that a class action be true, hybrid, or spurious, was replaced by specific requirements applicable to all class actions.<sup>20</sup>

<sup>17</sup> In the true class action the right sought to be enforced was joint, common, or derivative. The hybrid class action was characterized by common questions of fact and the presence of property which called for distribution or management. The spurious class action involved common questions of law or fact affecting the several rights of the class members. See 3B J. MOORE, *supra* note 12, § 23.08[1], at 23-2505 to 23-2610.

A classic example of the difficulty which courts had in classifying particular actions is *Deckert v. Independence Shares Corp.*, 27 F. Supp. 763 (E.D. Pa.), *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd*, 311 U.S. 282 (1940), *on remand*, 39 F. Supp. 592 (E.D. Pa.), *rev'd sub nom.* *Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Deckert*, 123 F.2d 979 (3d Cir. 1941). Five courts heard the case without agreeing as to the proper category. See Note, *Class Actions Under Amended Rule 23: Three Years of Judicial Interpretation*, 49 BOSTON U.L. REV. 682, 684 (1969). As the Note indicates, courts frequently chose an appropriate category to arrive at a desired result.

<sup>18</sup> See Ford, *The History and Development of Old Rule 23 and the Development of Amended Rule 23*, 32 ABA ANTITRUST SECTION 254 (1966).

<sup>19</sup> FED. R. CIV. P. 23(c)(2). The section provides:

In any class action maintained under subdivision (b)(3) [providing for class actions where questions of law or fact common to the members predominate over any questions affecting only individuals], the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

See Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1223 (1966), wherein the author states: "The change in spurious class actions from the old to the new rules is most significant. The mere fact that an absent member must now take the initiative to exclude himself . . . will result in a much greater range of effectiveness for class actions."

<sup>20</sup> FED. R. CIV. P. 23(b) adds to the general prerequisites of subdivision (a) [requiring a class so numerous that joinder is impracticable, questions of law or fact common to the class, common claims and defenses among class members, and protection of the interests of the class by the representatives] the following requirements for all class actions:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

That the provisions of the new rule 23 would facilitate consumer class actions was made clear in *Eisen v. Carlisle & Jacquelin*.<sup>21</sup> Mr. Eisen alleged a conspiracy to monopolize odd lot trading on the New York Stock Exchange and to fix the odd lot differential at an excessive amount. He estimated that there were some 3,750,000 class members. The Court of Appeals for the Second Circuit declared that his class action under the Sherman Act should not have been dismissed simply because his individual damages were relatively minute. Indeed, the court went so far as to state that an individual claimant could be an adequate representative of the huge class of consumers which would be involved.<sup>22</sup> Another type of consumer class action under new rule 23 and the antitrust laws has involved alleged boycotts by realtors who are said to have refused to sell houses to Negroes or to have charged excessive prices for homes sold to Blacks.<sup>23</sup>

However, most of the consumer treble damage actions which are being brought have followed government prosecutions. There

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(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

<sup>21</sup> 391 F.2d 555 (2d Cir. 1968). The *Eisen* case was remanded and is still being litigated.

After almost 18 months of additional factfinding, the district court is still unable to decide the propriety of a class action. *Eisen v. Carlisle & Jacquelin*, [Current Binder] CCH FED. SEC. L. REP. ¶ 92,830 (S.D.N.Y. Oct. 8, 1970) (order for pretrial conference to discuss the manageability of and notice to the class).

<sup>22</sup> The *Eisen* court took a rather liberal position on the manageability of a class action. Other courts are prone to dismiss if the class is exceptionally large. See *Hackett v. General Host Corp.*, Civil No. 68-558 (E.D. Pa. July 30, 1970); *Hawaii v. Standard Oil Co.*, Civil No. 2826 (D. Hawaii 1969).

Even if the court finds the action manageable, with fair representation of all concerned parties, plaintiffs must further demonstrate a predominance of common questions over individual ones and the superiority of a class action over alternative methods. See *Goldman Theatres v. Paramount Film Distributing Corp.*, 49 F.R.D. 35 (E.D. Pa. 1969) (a good discussion of the predominant question issue); *School Dist. v. Harper & Row Publishers*, 267 F. Supp. 1001 (E.D. Pa. 1967) (action dismissed because individual questions predominated); Note, *supra* note 17, at 695-99.

<sup>23</sup> *Bratcher v. Akron Area Bd. of Realtors*, 381 F.2d 723 (6th Cir. 1967). See *Baker v. F & F Investment Co.*, 420 F.2d 1191 (7th Cir. 1970).

are a number of such treble damage actions pending in the courts, most of which have been consolidated under the Multidistrict Litigation Act.<sup>24</sup> Thus, cases have been brought by various private parties against certain automobile manufacturers charged with conspiring to delay and obstruct the development and installation of pollution control devices in motor vehicles.<sup>25</sup> These cases have brought into the vernacular the term "product fixing,"<sup>26</sup> which involves the joint efforts of manufacturers to limit competition for product quality. In addition, Justice Department proceedings against antibiotic drug manufacturers have spawned more than 100 separate consumer actions, all of which were consolidated in the District Court for the Southern District of New York.<sup>27</sup> Presently, Judge Wyatt has completed the task of administering a proposed \$82 million settlement program, while conducting trial proceedings in the unsettled cases.<sup>28</sup>

Thus, the consumer movement has found a home in the federal courts under the antitrust laws. The current treble damage cases make it quite evident that, given anticompetitive consumer abuses and a federal remedy under the antitrust laws, consumers have learned very well how to protect themselves.<sup>29</sup> Certainly, one of the basic antitrust tenets, identical with consumer goals and reflected in the cases discussed, is that competition and marketing decisions should be in terms of price, quality, and service. Horizontal price fixing, bid rigging, and agreements to divide customers and territories

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<sup>24</sup> 28 U.S.C. § 1407 (Supp. IV, 1969).

<sup>25</sup> *In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equip.*, 5 TRADE REG. REP. (1970 Trade Cas.) § 73,317 (C.D. Cal. Sept. 4, 1970).

<sup>26</sup> See E. COX, R. FELLMETH & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION 16-17 (1969) [hereinafter cited as NADER REPORT].

Product fixing is beginning to replace price fixing as a central method of avoiding competition. In product fixing, competitors agree to limit the development or characteristics of their products in order to increase sales and profits. The result is planned obsolescence in many products . . . which require the purchase of a new product or high repair costs. *Id.*

<sup>27</sup> *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970).

<sup>28</sup> See *United States v. Chas. Pfizer & Co.*, 426 F.2d 32 (2d Cir. 1970), wherein the government's action against the drug manufacturers was reversed, causing more problems for Judge Wyatt.

<sup>29</sup> There is a hint of things to come in a recent *Yale Law Journal* Note, in which the author suggested that consumer groups could take advantage of the Supreme Court's decision in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969). There the Court held that tying restrictions requiring a borrower to purchase only the products of the lender's affiliate constituted per se violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964). The author of the Note suggests that low income consumers might bring class actions against similar tying arrangements of ghetto creditors who extend long term credit only if the consumer uses it to buy goods from ghetto merchants. See Note, *Consumers and Antitrust Treble Damages: Credit-Furniture Tie-ins in the Low Income Market*, 79 YALE L.J. 254 (1969).

are declared unlawful because they deprive customers of the ability to make buying choices based on price, quality, and service.<sup>30</sup> In the automobile pollution case, the manufacturers were proceeded against because they allegedly colluded to hold back the development of better products.<sup>31</sup> Tie-in arrangements are struck down because buyers are forced to purchase merchandise for reasons other than price, quality, or service.<sup>32</sup> Reciprocal dealing arrangements are attacked because the supplier who utilizes the potential volume of his purchases in order to promote the reciprocal sale of his own products deprives his competitors of sales they might otherwise have made on the basis of price, quality, or service.<sup>33</sup>

Although many of the consumer demands relating to free, competitive markets thus find adequate remedies under the existing antitrust laws, not all business activities which are antithetical to consumer and antitrust goals rise to the level of antitrust violations, or at least they have not yet been considered such.<sup>34</sup> Antitrust legislation was formulated under the assumption that consumer protection is best served by free competition<sup>35</sup> — by keeping the channels of commerce unclogged the consumer should have a wide selection of quality products at reasonable prices. Similarly, a significant, if generally unarticulated, premise of the consumer movement is the need to channel business energies into types of competition that have a relationship to price, quality, and service. Yet consumer activists contend that the prohibitions of the antitrust laws alone do not guarantee this type of competition. They point out that today consumer competence is just as essential to the attainment of free competition as is the removal of trade restraints. They stress that it is the *competent* consumer who is able to make rational choices among competitive products and that consumer competence is diminished where purchasers are not provided with adequate and accurate information necessary to make buying decisions based on pure

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<sup>30</sup> See *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

<sup>31</sup> *In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equip.*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,317 (C.D. Cal. Sept. 4, 1970).

<sup>32</sup> See *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1964).

<sup>33</sup> See *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966).

<sup>34</sup> See text accompanying notes 38-46 *infra*.

<sup>35</sup> See *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4-5 (1958).



quality and service.<sup>36</sup> Consumer spokesmen further contend that the absence of such information leaves the consumer at the mercy of those marketing practices which play on his vanity and ignorance.<sup>37</sup>

Consumer spokesmen claim there has been a breakdown in the traditional competitive processes in that competition in price, quality, and service is being avoided by the simple device of not giving consumers sufficient information on which to base decisions as to the best buy. For example, suppliers are directing their consumer product advertising to irrational or irrelevant qualities.<sup>38</sup> Instead of receiving information concerning price, performance, quality, safety, and service, the public is being told to buy products because they will make the consumer more glamorous, prosperous, or desirable. Consumer activists claim they are being given pretty packages, the varying sizes and shapes of which proliferate daily, but they are not being told what is in the package and what makes it a better buy than a competitor's product. It is argued that the consumer wants hard facts about the products and services being offered to him, but too often he is not getting them.

It is because consumer advocates claim that purchasers are not getting facts about how long an appliance should give service and the type of assistance which will be rendered if the product breaks down, that there have been outcries for strong guarantee legislation.<sup>39</sup> Because it is claimed that the consumer is not being suffi-

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<sup>36</sup> See Barnes, *Considerations Concerning A Public Policy Toward Administered Prices*, in SUBCOMM. ON ANTITRUST AND MONOPOLY OF THE SENATE COMM. ON THE JUDICIARY, 88TH CONG. 1ST SESS., ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY 44 (Comm. Print 1963). In this essay, Professor Barnes emphasized the importance of consumer competence within a competitive economy and warned of the dangers of inadequate product information:

Consumer competence in choosing rationally and accurately among competing products is the very foundation of an efficient competitive economy. Any development which impairs the capacity of consumers to make rational choices, to compare competitive products accurately, to recognize genuine differences in price, and in short, to make the choice which is right in light of all relevant considerations, must have the effect of impairing the capacity of markets to perform their functions. Only where the consumer choices are made competently can sales in the market place give preference to more competent and efficient producers and serve as an effective allocator of resources to their most efficient uses.

Consumer competence is impaired whenever consumers lack adequate information and understanding to make intelligent choices among inscrutable products. . . . Increasingly, the effort is made to substitute emotional attachment to the familiar brand for intelligent comparison of competing products, so that the buyer responds to the rationale of sales promotion rather than an objective calculus of prices and utilities. *Id.* at 67.

<sup>37</sup> *Id.*

<sup>38</sup> See NADER REPORT, *supra* note 26, at 18-19.

<sup>39</sup> See S. 3074, 91st Cong., 2d Sess. (1970).

ciently told how to care for products he buys, the Federal Trade Commission has proposed that permanent care labeling information should be required of textile and garment manufacturers.<sup>40</sup> It is because many toiletry and grocery product manufacturers have chosen not to package their products in a manner that would facilitate consumer price-quality comparisons, that there was first an outcry for truth in packaging legislation and currently there are further demands for unit pricing legislation.<sup>41</sup> And it was because creditors chose not to advise the consumer clearly about the actual cost of consumer credit, that the Truth in Lending Act<sup>42</sup> was enacted to assist the consumer in determining credit values.

Consumer demands for more vigorous competition in terms of price, quality, and service, and for the information on which to base decisions as to the best buy, are becoming more articulate and stronger each day. Although the agencies and legislatures may now be responding, consumer advocates claim that business is simply not listening. Ralph Nader recently told an audience of retailers that consumer product manufacturers are using advertising appeals to reduce quality and price competition. He declared that "competition is so rare today as to constitute a deviation from the norm."<sup>43</sup> He stressed that producers of breakfast foods are concentrating so hard on packaging and "the smile on the animal's face," that little attention is given to "what's inside the package."<sup>44</sup>

There are indications that in certain oligopolistic consumer products industries, emphasis on noncompetitive advertising appeals rather than price and quality competition may be resulting in higher consumer prices and greater market concentration. On April 29, 1970, Senator William Proxmire wrote to the Federal Trade Commission urging an investigation of consumer products industries in which not more than four firms control 50 percent of the sales.<sup>45</sup> The following week the FTC issued a report based on a study of the food industry, in which it was concluded that industry profit rates are significantly higher in food manufacturing industries where

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<sup>40</sup> See Proposed FTC Trade Reg. Rules on Care Labeling of Textile Products, 34 Fed. Reg. 17,776 (1969).

<sup>41</sup> See H.R. 11549, 91st Cong., 1st Sess. (1969).

<sup>42</sup> 15 U.S.C. §§ 1601-13, 1631-41, 1661-65 (Supp. IV, 1969). The Act is Title I of the Consumer Credit Protection Act, Pub. L. No. 90-321, tits. I-V, 82 Stat. 144 (codified in scattered sections of 15, 18 U.S.C.). Truth in Lending went into effect on July 1, 1969.

<sup>43</sup> N.Y. Times, May 12, 1970, at 57, col. 7.

<sup>44</sup> *Id.*

<sup>45</sup> Washington Post, May 4, 1970, at 2, cols. 1-2.

the top four firms account for more than 40 percent of total shipments, and particularly when significant advertising barriers to entry exist.<sup>46</sup> Thus, we may soon see antitrust enforcement activities involving concentrated consumer products industries where it is claimed that "soft" competition through advertising and selling techniques which do not relate to price, quality or service has led to excessive profits and barriers to entry.

However, because many of these activities which deprive the consumer of adequate and useful product information have not yet been recognized as antitrust violations, the courts are generally not available to consumers with respect to such practices. It is here that consumers have turned to the regulatory agencies and, to a greater extent, to the legislatures for protection and redress.

### III. CONSUMER PROTECTION BY THE FTC

Although consumerism may appear to be a recent development, the consumer has had an established spokesman in the FTC. For many years the mission of the FTC has been to control the myriad of marketing practices that prevent the consumer from efficiently fulfilling his vital role in a competitive economy. Created by statute in 1914,<sup>47</sup> the FTC was envisioned as an agency for dealing primarily with antitrust problems.<sup>48</sup> But with the passage of the Wheeler-Lea Act<sup>49</sup> in 1938, prohibiting "unfair or deceptive acts or practices," the Commission received a congressional mandate to protect the consumer and his function in the marketplace. For the last three decades, the Commission's major function has been to define precisely what practices are unfair and deceptive and then to prohibit their recurrence. Many of today's consumer advocates are claiming, however, that the FTC has been inexcusably lax in looking out for consumer interests. They have lost faith in the willingness and the ability of the Commission to proceed on their behalf, particularly in difficult cases against large, national manufacturers.<sup>50</sup> Recently, a group of

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<sup>46</sup> See FTC, ECONOMIC REPORT ON INFLUENCE OF MARKET STRUCTURE ON PROFIT PERFORMANCE OF FOOD MANUFACTURING COMPANIES, summarized in 3 TRADE REG. REP. § 10,378 (FTC Release May 5, 1970).

<sup>47</sup> Federal Trade Commission Act § 1, ch. 311, § 1, 38 Stat. 717 (1914), as amended 15 U.S.C. § 41 (1964).

<sup>48</sup> NADER REPORT, *supra* note 26, at 215; cf. MacIntyre & von Brand, *Unfair Methods of Competition as an Evolving Concept — Prelude to Consumerism*, 44 ST. JOHN'S L. REV. 597, 609-10 (1970). See also *Raladam Co. v. FTC*, 42 F.2d 430 (6th Cir. 1930), *aff'd*, 283 U.S. 643 (1931).

<sup>49</sup> Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1964), amending ch. 311, § 5, 38 Stat. 717 (1914).

<sup>50</sup> See, e.g., *Hearings on H.R. 15440 & S. 985 Before the House Comm. on Inter-*

"Nader's Raiders" published a devastating critique of the FTC's past policies and practices. According to their report, the Commission "has failed to detect violations systematically," "has failed to establish efficient priorities for its enforcement energy," "has failed to enforce the powers it has with energy and speed," and "has failed to seek sufficient statutory authority to make its work effective."<sup>51</sup> Also critical of the agency's past performance is the recent report issued by a committee of the American Bar Association.<sup>52</sup> It concluded that the Commission's past consumer protection efforts have been ineffective, lacking a unified approach based on policy planning, and that the FTC has provided insufficient leadership to state and local authorities.<sup>53</sup>

That these charges may be true is unfortunate, for a vigorous consumer protection program might have obviated some of the recently enacted consumer legislation and could have rendered unnecessary many of the current demands for more legislation relating to the control of marketing practices. For example, there is little question that the Commission can insist that suppliers disclose product information when its absence could deceive purchasers.<sup>54</sup> It is arguable that this authority for ordering the disclosure of material facts where their absence would be deceptive could have supported rulings requiring the disclosure of more adequate product information in general, thereby facilitating the consumer's function in the marketplace.<sup>55</sup> In addition, the FTC had previously ordered a more complete disclosure of credit terms in commercial transactions.<sup>56</sup> But it took the enactment of the Truth in Lending Act<sup>57</sup> for the Commission to more actively assist the consumer in obtaining adequate credit information. Under that Act, the FTC is directed to enforce provisions requiring creditors to disclose the annual percentage rate of finance charges payable by the consumer.<sup>58</sup>

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*state and Foreign Commerce*, 89th Cong., 2d Sess. 56 (1966) [hereinafter cited as *Hearings on H.R. 15440*].

<sup>51</sup> NADER REPORT, *supra* note 26, at 39.

<sup>52</sup> REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).

<sup>53</sup> *Id.* at 37-39.

<sup>54</sup> See *J. B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967); *Ward Labs., Inc. v. FTC*, 276 F.2d 952 (2d Cir. 1960).

<sup>55</sup> See *MacIntyre & von Brand*, *supra* note 48, at 616.

<sup>56</sup> See Leon A. Tashof, [1967-1970 Transfer Binder] *TRADE REG. REP.* ¶ 18,606 (FTC 1968).

<sup>57</sup> 15 U.S.C. §§ 1601-13, 1631-41, 1661-65 (Supp. IV, 1969).

<sup>58</sup> *Id.* § 1607(c).

Similarly, the Commission had previously proceeded under the authority of section 5 of the Federal Trade Commission Act (FTCA)<sup>59</sup> against deceptive packaging practices, such as those involving "slack filled" packages.<sup>60</sup> However, Congress concluded that the language of section 5 as construed by the FTC was too imprecise to require that product information be sufficient to aid the consumer in making rational buying choices in terms of price and quantity.<sup>61</sup> Because of this finding, the Fair Packaging and Labeling Act<sup>62</sup> was passed in 1966. At its core are two important provisions. Section 4 outlines specific rules for labeling and for the placement, form, and contents of a statement of quantity.<sup>63</sup> And section 5 explicitly directs the FTC to promulgate regulations directed against practices that either deceive consumers, such as slack filling, or impair the consumer's ability to make value comparisons among products.<sup>64</sup> Activities in violation of these regulations and the mandatory provisions of the Act are automatically deemed "unfair or deceptive acts or practices," and the FTC is authorized to proceed against them under its traditional authority in section 5 of the FTCA.<sup>65</sup>

As another example of the FTC's failure to act, it is arguable that the Commission could have proceeded more actively against misleading product warranties. Vigorous enforcement might have effectively discouraged suppliers from representing in their guarantees that they could adequately service products when in fact they could not. By the same token, the Commission could have stopped the inclusion of fine print disclaimers where the advertising and the express warranty statements deceptively proclaim virtually unlim-

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<sup>59</sup> 15 U.S.C. § 45 (1964).

<sup>60</sup> See, e.g., *The Papercraft Corp.*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,721 (FTC 1964). "Slack filling" involves the use of oversized containers to create a false and misleading impression of the quantities contained therein. *Id.* at 21,652.

<sup>61</sup> S. REP. NO. 1186, 89th Cong., 2d Sess. (1966). See also *Hearings on H.R. 15440*, *supra* note 50, at 39, 40.

<sup>62</sup> 15 U.S.C. §§ 1451-61 (Supp. IV, 1969). The statute's declaration of policy clearly reflects the need for more product information:

Informed consumers are essential to the fair and efficient functioning of a free economy. Packages and their labels should enable the consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. Therefore, it is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer goods. *Id.* § 1451.

<sup>63</sup> *Id.* § 1453.

<sup>64</sup> *Id.* § 1454.

<sup>65</sup> *Id.* § 1456.

ited warranty protection.<sup>66</sup> But as a result of FTC inaction, these practices are now the subject of a guarantee bill which has passed the Senate.<sup>67</sup>

Perhaps in response to the criticism and the recent legislation, the FTC has now embarked upon a strong consumer protection campaign, reflected not only in the change of its bureaucratic structure but also in its recent rulings. A Consumer Protection Bureau was established in June 1970, under a reorganization plan designed to streamline the operations of the Commission.<sup>68</sup> Substantively, recent Commission complaints, cease and desist orders, and industry proceedings are creating important new precedents under section 5 of the Federal Trade Commission Act in areas where both federal and state legislative demands are being made. Thus, the Commission has required door-to-door salesmen, found to have engaged in high-pressured, deceptive trade practices, to provide a 3-day "cooling off" period in their contracts, during which time consumers will be free to rescind such contracts.<sup>69</sup> Similar rescission periods are proposed in current federal and state bills.<sup>70</sup>

In another area, the Commission has prohibited suppliers from making unfair use of the holder in due course doctrine. Under this technique, retailers would execute a negotiable instrument in connection with a consumer sale and then assign it to a finance company which is immune to consumer claims.<sup>71</sup> Because consumers may be unaware that the assignment of a negotiable instrument affects

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<sup>66</sup> FTC Guides Against Deceptive Advertising of Guarantees, 16 C.F.R. § 239.0-.7 (1970).

<sup>67</sup> See text accompanying notes 127-38 *infra*.

<sup>68</sup> 3 TRADE REG. REP. ¶ 9555, at 16,038 (FTC Release June 3, 1970). See also Weinberger, *The Federal Trade Commission: Progress and a New Profile*, 22 CASE W. RES. L. REV. 5, 7-8 (1970), (*supra* in this issue).

<sup>69</sup> Household Sewing Mach. Co., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,882 (FTC 1969). See Proposed FTC Trade Reg. Rules on Cooling Off Period for Door-to-Door Sales, 35 Fed. Reg. 15,164 (1970). For a list of states in which this cooling off period is already required by law, see Household Sewing Mach. Co., *supra*, at 21,218, n.33.

<sup>70</sup> See, e.g., H.R. 10923, 91st Cong., 1st Sess. (1969); H.R. 4342, Fla. 1st Legis., 2d Reg. Sess. (1970); S. 1735, Mich. 75th Legis., Reg. Sess. (1970).

<sup>71</sup> See Thermachemical Prods., Inc., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,862 (FTC 1969), where the assignee was merely a shell corporation for the purpose of collecting on the defaulted notes. The assignee corporation issued no stock, held no meetings, elected no directors, and only had one officer, whose "offices" were closely connected with the respondent's. The Commission skirted the issue of whether the assignee would be a holder in due course under applicable state law by stating that it was concerned only with the question of whether the assignee's representation that it was a holder in due course was an unfair practice. *Id.* at 21,200-01. See also All-State Indus., Inc., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,740 (FTC 1969), *affirmed*, 423 F.2d 423 (4th Cir. 1970).

their rights against the seller and the assignee, the Commission found that the failure to inform purchasers of this fact constitutes an unfair trade practice.<sup>72</sup>

The Court of Appeals for the Tenth Circuit recently upheld an FTC order requiring a company to disclose to consumers that they are under no obligation to return or care for unsolicited merchandise and that payment is required only if the consumer decides to purchase the merchandise.<sup>73</sup> Legislation has also been proposed in this area.<sup>74</sup>

In a recent case, the Commission has included in a proposed consent order a requirement that a company must not withhold prize money from consumers who had returned contest entries containing at least one correct answer to each question.<sup>75</sup> The respondent had awarded too few prizes, the Commission claimed, because of an undisclosed rule which required contestants to include more than one correct answer to certain questions. The proposed order apparently demonstrates the Commission's efforts to expand its remedial powers to include consumer restitution.

In a number of proposed Industry Guides and Trade Regulation Rules, the Commission is seeking to require advertising and labeling information concerning the properties and performance of products,<sup>76</sup> and any limitations on the availability of sale merchan-

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<sup>72</sup> In *All-State Indus., Inc.*, [1967-1970 Transfer Binder] TRADE REG. REP. § 18,740 (FTC 1969), the Commission noted:

If the instrument executed in connection with the purchase is negotiated to a holder in due course, the buyer may be indebted to the assignee notwithstanding any defense or claim the buyer may have against the seller on the original contract such as non-delivery or defects in the purchased merchandise (see the Uniform Commercial Code § 3-305, now adopted in most states). In this circumstance, we find it palpably unfair for a seller who routinely assigns instruments . . . to fail to disclose . . . that such transfer is contemplated and may result in substantial alteration of the buyer's rights and liabilities. *Id.* at 21,105-06.

<sup>73</sup> *Eastwood v. FTC*, 418 F.2d 419 (10th Cir. 1969). See *The FTC Gets Tough*, TIME, Oct. 19, 1970, at 80, for a survey of the FTC's most recent consumer protection actions against soft drink, suntan lotion, and light bulb manufacturers, from which the FTC, under Chairman Miles Kirkpatrick, is demanding more accurate product information. A proposed FTC order would also require that contest advertisers fully disclose the odds against an entrant's winning. *Id.*

<sup>74</sup> See, e.g., S. 2, Ohio 108th Gen. Ass'y (1970).

<sup>75</sup> *Coca Cola Co.*, 3 TRADE REG. REP. § 19,290 (FTC July 1, 1970). See also *Curtis Publishing Co.*, [1969-1970 Transfer Binder] TRADE REG. REP. § 18,798 (FTC 1969) (The proposed order would require a publisher to offer cash refunds for the unexpired portions of subscriptions to a magazine that ceased publication.); *The FTC Gets Tough*, *supra* note 73. But see *Curtis Publishing Co.*, 3 TRADE REG. REP. § 19,376 (FTC Oct. 23, 1970) (hearing examiner found that the FTC lacks jurisdiction to order monetary restitution).

<sup>76</sup> See, e.g., Proposed FTC Trade Reg. Rules on Care Labeling of Textile Products, 34 Fed. Reg. 17,776 (1969); Proposed FTC Trade Reg. Rules on Incandescent Electric

dise.<sup>77</sup> In addition, there are proposed guides for including with the sale of certain products implied warranties of fitness and merchantability.<sup>78</sup> All of this is covered in bills under current study.<sup>79</sup>

Through cooperative efforts between its field offices and local officials in 11 key cities, the Commission is now embarking on an attack against localized abuses.<sup>80</sup> It will lend its expertise to state and local officials by recommending the appropriate actions which need to be taken against frauds at the local level. Where local laws are inadequate, the Commission will assist local officials in securing new legislation.

The Commission's efforts to effectuate greater consumer protection under the existing authority of section 5 of the FTCA has not, however, quelled the pervading dissatisfaction over its past policies and enforcement practices. For the many consumer spokesmen who have already lost faith in the Commission, its recent actions are still too little, or they have come too late. Moreover, some believe that the Commission's basic enforcement tool — the cease and desist order<sup>81</sup> — is more of a handicap than a help to the consumer, since it is issued only after laborious, time-consuming proceedings. Literally years pass between the filing of a complaint and the issuance of a final decree.<sup>82</sup> Additionally, the cease and desist order is prospective only, imposing no sanctions for past abuses and those occurring during the proceedings. Others blame the Commission for using its enforcement tools too meekly. This was evidenced when a group of students attempted to intervene in a false advertising proceeding against a soup company. Their purpose in intervening was to demand that the Commission's decree include an order requiring the company to state clearly in all future advertising that the Commission had proceeded against it.<sup>83</sup>

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Light Bulbs, 34 Fed. Reg. 12,528 (1969); Proposed FTC Trade Reg. Rules on Gasoline Octane Ratings, 34 Fed. Reg. 12,449 (1969).

<sup>77</sup> See Proposed FTC Trade Reg. Rules on Retail Food Store Advertising and Marketing Practices, 34 Fed. Reg. 18,252 (1969).

<sup>78</sup> See Proposed FTC Guides for Advertising Over-the-Counter Drugs, 34 Fed. Reg. 5387 (1969); Proposed FTC Guides for the Household Furniture Industry, 34 Fed. Reg. 2998 (1970).

<sup>79</sup> See S. 3074, 91st Cong., 2d Sess. (1969); H.R. 16634, 91st Cong., 2d Sess. (1970); H.R. 16638, 91st Cong., 2d Sess. (1970).

<sup>80</sup> See 5 TRADE REG. REP. ¶ 50,274, at 55,604 (FTC Release Feb. 5, 1970).

<sup>81</sup> See 15 U.S.C. § 45(b) (1964).

<sup>82</sup> See note 108 *infra*.

<sup>83</sup> Campbell Soup Co., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,261 (FTC May 25, 1970). The FTC, however, found that the intervenors' petition did not raise sufficient issues of either law or fact to require further actions in the form of a



## IV. PROPOSED CONSUMER PROTECTION LEGISLATION

Amid their discontent over FTC shortcomings and the absence of adequate private remedies under the antitrust laws, consumer spokesmen are pressing for legislative reforms and directives, designed to enhance governmental protection of the consumer. For instance, many are calling for the establishment of a new agency, totally independent of the FTC and charged with the responsibility of acting solely on behalf of the consumer. Three bills now pending in Congress outline a diversity of structures and powers which such a new agency might assume. One proposal would create an Independent Consumer Council, a nongovernmental corporation free from direct political controls.<sup>84</sup> Another measure would establish a new cabinet post, the Department of Consumer Affairs.<sup>85</sup> A third bill would provide for both an Office of Consumer Affairs within the Executive Office of the President and a Consumer Protection Division within the Department of Justice.<sup>86</sup>

Notwithstanding the differences in bureaucratic structures, the respective offices have in common a threefold role. First, they would be authorized to appear before judicial and regulatory proceedings on behalf of consumer interests.<sup>87</sup> Second, the new offices would all act as clearinghouses for complaints concerning commercial trade practices.<sup>88</sup> The complaints would be referred to the

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hearing. In addition, the FTC felt that its cease and desist order would sufficiently serve the public interest, and therefore there was no need for the affirmative disclosure. *Id.* at 21,422-23. The Commission has since included provisions in proposed cease and desist orders which would require advertisers to make such public disclosures for 1 year. See *Standard Oil Co.*, 3 TRADE REG. REP. ¶ 19,352 (FTC Sept. 29, 1970); *Coca Cola Co.*, 3 TRADE REG. REP. ¶ 19,351 (FTC Sept. 29, 1970).

<sup>84</sup> S. 2959, 91st Cong., 1st Sess. (1969).

<sup>85</sup> S. 860, 91st Cong., 1st Sess. (1969); H.R. 6037, 91st Cong., 1st Sess. (1969). One provision in these identical bills would even transfer to the new cabinet department authority originally vested in the FTC by the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451, 1454, 1456 (Supp. IV, 1969). S. 860, 91st Cong., 1st Sess. § 6(a)(1); H.R. 6037, 91st Cong., 1st Sess. § 6(a)(1) (1969).

<sup>86</sup> S. 3240, 91st Cong., 1st Sess. (1969); H.R. 14758, 91st Cong., 1st Sess. (1969). See also H.R. 13793, 91st Cong., 1st Sess. (1969).

<sup>87</sup> S. 3240, 91st Cong., 1st Sess. § 202 (1969); H.R. 14758, 91st Cong., 1st Sess. § 202 (1969); S. 2959, 91st Cong., 1st Sess. § 13 (1969); S. 860, 91st Cong., 1st Sess. § 7 (1969); H.R. 6037, 91st Cong., 1st Sess. § 7 (1969). This is in answer to criticism that most information presented at these proceedings has been compiled by producers and manufacturers and is therefore not entirely objective. See *Hearings on H.R. 7179 Before the Executive and Legislative Reorganization Subcomm. of the House Comm. on Gov't Operations*, 89th Cong., 2d Sess. 92-93, 152-53 (1966) [hereinafter cited as *Hearings on H.R. 7179*].

<sup>88</sup> S. 3240, 91st Cong., 1st Sess. § 104 (1969); H.R. 14758, 91st Cong., 1st Sess. § 104 (1969); S. 2959, 91st Cong., 1st Sess. § 14 (1969); S. 860, 91st Cong., 1st Sess. § 8 (1969); H.R. 6037, 91st Cong., 1st Sess. § 8 (1969). These provisions are in

agency whose regulatory authority provided the most effective remedies for the problem. Finally, the proposed bodies would be directed to develop wide-ranging programs for the collection and dissemination of helpful product information to the consumer.<sup>89</sup>

There seems to be little opposition to the basic idea of establishing some type of federal agency for coordinating the wide spectrum of national and state consumer programs and advising the President, the Congress, and the various administrative bodies about effective consumer protection policies. Beyond that, however, the proposals have been the subject of political controversy. Recent congressional hearings have highlighted fundamental disagreements among congressional and administrative officials over the allocation of enforcement powers to a new consumer office, and over the right of this new office to intervene on behalf of consumers in judicial and regulatory proceedings. As an example, the Administration's proposal,<sup>90</sup> creating an Office of Consumer Affairs within the Executive Office and a Consumer Protection Division within the Justice Department, has been criticized for assigning enforcement powers to an already overburdened department,<sup>91</sup> and for giving it the final say on whether or not to intervene for the consumer, rather than allowing the consumer office to make a final determination.<sup>92</sup> In addition, the hearings have revealed the Administration's concern over the extent to which the federal government should become involved in product testing.<sup>93</sup>

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response to complaints that the multiplicity of government agencies has made it almost impossible for the average consumer to determine what body has jurisdiction over his particular problem. See *Hearings on H.R. 7179*, *supra* note 87, at 160, 164-65.

<sup>89</sup> S. 3240, 91st Cong., 1st Sess. § 103(b)(7) (1969); H.R. 14758, 91st Cong., 1st Sess. § 103(b)(7) (1969); S. 2959, 91st Cong., 1st Sess. § 15 (1969); S. 860, 91st Cong., 1st Sess. § 9 (1969); H.R. 6037, 91st Cong., 1st Sess. § 9 (1969).

<sup>90</sup> H.R. 14758, 91st Cong., 1st Sess. (1969).

<sup>91</sup> *Hearings on H.R. 6037 & Related Bills Before the Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 1st Sess. 252 (1969) [hereinafter cited as *Hearings on H.R. 6037*]. The alternative proposals to establish a Department of Consumer Affairs, H.R. 6037, 91st Cong., 1st Sess. (1969) and S. 860, 91st Cong., 1st Sess. (1969), may result in some jurisdictional problems if some of the powers and duties of the FTC and the Food and Drug Administration are transferred to the new department. See Forte, *The Department of Consumers*, 20 VAND. L. REV. 969 (1967), in which the author discusses previous bills to create a separate consumer department at the cabinet level.

<sup>92</sup> *Hearings on H.R. 6037*, *supra* note 91, at 217-18. For further criticism of a proposed Office of Consumer Affairs within the Executive Office, see *Hearings on S. 860 & S. 2045 Before the Subcomm. on Executive Reorganization of the Senate Comm. on Gov't Operations*, 91st Cong., 1st Sess. 713-724 (1969).

<sup>93</sup> *Hearings on H.R. 6037*, *supra* note 91, at 212, 222, 250.

Both the Senate and the House Government Operations Committees have reported out the consumer agency bills, which may reach the floor of both houses during the 1970

Notwithstanding the continuing, albeit necessary, reliance on the various branches of the national government to protect consumer interests, many consumer advocates believe that the Government remains lax and that its limited resources preclude detection and prevention of all consumer frauds which occur in the marketplace.<sup>94</sup> In the face of such laxity on the part of the Government, consumer spokesmen are demanding that the public be given more direct avenues of legal redress. Of the congressional proposals which would bestow new private rights of action, the consumer class action bills<sup>95</sup> are certainly the most far-reaching and the most controversial.

A discussion of the relative merits of the various class action proposals must be prefaced with a brief survey of the relevant statutory and decisional law. At present, the federal courts afford consumers only restricted access to direct relief against the merchants of fraud and deceit. This is because federal courts have limited jurisdiction, which is restricted to those consumer suits which either arise under federal law or are between parties of diverse citizenship.<sup>96</sup> Because there is no federal substantive law today authorizing private suits against unfair consumer practices which do not constitute antitrust violations, the "arising under" requirement cannot be satisfied for most consumer grievances.<sup>97</sup> Unlike the antitrust laws,<sup>98</sup> section 5 of the FTCA<sup>99</sup> does not create a private cause of action for consumers.

But while the doors of the federal courts might remain closed to private actions by defrauded or deceived consumers who lack a federal claim, they may be opened where the parties to the action are citizens of different states. Consumers encounter substantial obstacles, however, in establishing diversity jurisdiction. First, many consumer abuses are committed at the local level by suppliers who are citizens of the injured consumer's home state.<sup>100</sup> And even if diversity of citizenship can be established, consumers encounter a

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post-election session. See H.R. REP. NO. 1361, 91st Cong., 2d Sess. (1970); S. REP. NO. 1331, 91st Cong., 2d Sess. (1970).

<sup>94</sup> See, e.g., *Hearings on H.R. 14931*, *supra* note 3, at 15, 44; *Hearings on S. 1980 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 25 (1969).

<sup>95</sup> See bills listed in note 104 *infra*.

<sup>96</sup> See U.S. CONST. art. III, § 2.

<sup>97</sup> See 28 U.S.C. § 1337 (1964), which gives district courts original jurisdiction over suits "arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

<sup>98</sup> Clayton Act § 4, 15 U.S.C. § 15 (1964).

<sup>99</sup> 15 U.S.C. § 45 (1964).

<sup>100</sup> *Hearings on H.R. 14931*, *supra* note 3, at 42.

second obstacle — the requirement that the amount in controversy exceed \$10,000.<sup>101</sup> The great majority of individual consumers suffer losses which are below the jurisdictional minimum.<sup>102</sup> Moreover, in *Snyder v. Harris*,<sup>103</sup> the Supreme Court recently ruled that plaintiffs in a class action suit brought under rule 23 of the Federal Rules of Civil Procedure could not aggregate their individual claims in order to reach the \$10,000 jurisdictional minimum. The effect of this decision was to put private redress in federal courts well beyond the reach of most consumers.

Thus, for those who apparently believe that federal courts are a proper forum for dealing with local consumer fraud and deception, it is understandable why considerable pressure is being brought to bear on Congress to facilitate consumer access to those courts. Many consumer advocates find that the proposed class action bills offer the greatest promise of opening the federal courts to all injured consumers.

At present nearly one dozen class action bills are pending in Congress.<sup>104</sup> Many are carbon copies of one another, and so far only one of these bills, S. 3201,<sup>105</sup> has been reported out of committee. As first proposed by the Administration, S. 3201 would have permitted private suits, including class actions, against suppliers who knowingly engage in any of 11 specified unfair or deceptive trade practices. These practices include many of those which have been determined unfair trade practices under section 5 of the Federal Trade Commission Act. This bill, however, would have permitted a consumer action only after the Government has successfully enjoined, or secured a consent decree against, the trade violation.<sup>106</sup> This need

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<sup>101</sup> See 28 U.S.C. § 1332(a) (1964).

<sup>102</sup> *Hearings on H.R. 14931, supra* note 3, at 44.

<sup>103</sup> 394 U.S. 332 (1969).

<sup>104</sup> H.R. 18764, 91st Cong., 2d Sess. (1970); H.R. 15656, 91st Cong., 2d Sess. (1970); H.R. 15655, 91st Cong., 2d Sess. (1970); H.R. 15543, 91st Cong., 2d Sess. (1970); H.R. 15066, 91st Cong., 1st Sess. (1969); H.R. 14931, 91st Cong., 1st Sess. (1969); H.R. 14832, 91st Cong., 1st Sess. (1969); H.R. 14627, 91st Cong., 1st Sess. (1969); H.R. 14585, 91st Cong., 1st Sess. (1969); S. 3201, 91st Cong., 2d Sess. (1970); S. 3092, 91st Cong., 1st Sess. (1969); S. 1980, 91st Cong., 1st Sess. (1969).

<sup>105</sup> 91st Cong., 1st Sess. (1969) [hereinafter cited as S. 3201]. Introduced and referred to the Committee on Commerce on December 3, 1969, it was reported out on August 14, 1970, in a completely amended version, S. 3201, Commerce Comm. Print, 91st Cong., 2d Sess. (1970) [hereinafter cited as S. 3201, Commerce Comm. Print]. See S. REP. NO. 1124, 91st Cong., 2d Sess. (1970) [hereinafter cited as S. REP. NO. 1124]. Because of its effect on the federal courts, the amended bill was referred, in an unusual maneuver, to the Committee on the Judiciary for further consideration. See text accompanying notes 117-19 *infra*.

<sup>106</sup> S. 3201, *supra* note 105, § 204. Aside from the FTC's traditional cease and desist orders, this bill as originally proposed would have given the FTC and the At-

for a government decree as a prerequisite to direct consumer redress has been described as a "triggering device."<sup>107</sup> It has been the focal point of much of the criticism against the Administration's bill. For example, one witness feared that an undue amount of time would elapse between a violation and the satisfactory completion of a government suit.<sup>108</sup> It was argued by consumer advocates that during the time it takes the government bureaucracy to make a decision, file suit, and secure compliance, a supplier or manufacturer could effectively dissipate its assets. A suit by a consumer would then be futile.

As an alternative to the Administration's rather restrictive proposal, Senator Tydings and Representative Eckhardt introduced what were described as "wide open" bills. These bills, S. 3092<sup>109</sup> and H.R. 14585,<sup>110</sup> would permit immediate consumer action in federal courts with respect to any practices violating section 5 of the Federal Trade Commission Act or any other federal or state law for the benefit of consumers. Thus, these bills would permit virtually unrestrained consumer class actions in the federal courts, regardless of the amount in controversy.

Most of the testimony by business interests has been in total opposition to any type of federal consumer class action statute. It has been claimed that class action suits do not provide for the swift and efficient resolution of consumer claims, but instead are cumbersome and time-consuming.<sup>111</sup> Reference has been made to the great administrative burden that any class action places upon a court, and it has been predicted that consumer actions against any and all unfair trade practices would completely swamp the federal courts.<sup>112</sup> Between the Administration's bill and the Tydings-Eckhardt proposal, it has been argued that the latter poses a greater threat to business interests. In essence, it is argued that a statute granting

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torney General authority to seek injunctive relief against unfair trade practices. *Id.* § 203.

<sup>107</sup> See *Hearings on H.R. 14931*, *supra* note 3, at 230-31.

<sup>108</sup> *Id.* It was noted during the hearings that an average of 5 years elapses between the receipt of a complaint by the FTC and the issuance of the cease and desist order. *Id.* at 176.

<sup>109</sup> 91st Cong., 1st Sess. (1969).

<sup>110</sup> 91st Cong., 1st Sess. (1969).

<sup>111</sup> See, e.g., *Hearings on S. 2246, S. 3092 & S. 3201 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 2d Sess., ser. 48, pt. 2, at 256-61, 388, 498-501 (1970) [hereinafter cited as *Hearings on S. 3201*]; *Hearings on H.R. 14931*, *supra* note 3, at 262-63.

<sup>112</sup> See, e.g., *Hearings on S. 3201*, *supra* note 111, at 297-99, 501; *Hearings on H.R. 14931*, *supra* note 3, at 342.

consumers unrestricted private remedies would be subject to rampant abuse. Plaintiffs would supposedly be uninterested in suing the "fly-by-night" operators who exploit consumers, but who may be judgment proof against substantial awards.<sup>113</sup> Rather, it is claimed that the class action remedy would be used to harass legitimate business enterprises. For example, these enterprises may be forced to defend claims which involve insignificant, technical, or isolated advertising violations that do not cause significant harm to the consumer.<sup>114</sup> To prevent such harassment, the Administration inserted in its bill a "triggering mechanism" and a list of specific violations. Under that bill, a consumer class action would not be permitted until a government agency had first decided that a particular practice is harmful enough to merit government intervention.

As noted above, consumer advocates have argued against predating direct redress on government enforcement, claiming that the latter has been sporadic and untrustworthy to date and should not be expected to improve in the future. Their arguments have apparently been persuasive to the Senate Commerce Committee. In reporting out the Administration's bill, S. 3201, that Committee amended it so that the "trigger mechanism" would not be required when an unfair trade practice results in a "substantial" injury to the consumer;<sup>115</sup> as implied by the proposed statute, a consumer incurs a substantial loss if he pays or becomes obligated to pay more than \$10 as a result of such practice.<sup>116</sup> In other words, those consumers whose individual claims are greater than \$10 would be able to file a class action regardless of whether the government sues or not.

It is as yet unclear whether S. 3201 as amended or any other consumer class action bill will be enacted by the 91st Congress. Although S. 3201 was reported out by the Senate Commerce Committee, it was referred to the Senate Committee on the Judiciary which conducted hearings on the bill.<sup>117</sup> Most of the witnesses at the hearings were firmly opposed to its allowing essentially unlimited class actions.<sup>118</sup> On October 5, 1970, the bill was reported out by the Senate Committee on the Judiciary without recommendation.<sup>119</sup>

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<sup>113</sup> See, e.g., *Hearings on S. 3201*, *supra* note 111, at 311, 453, 506.

<sup>114</sup> Cf. *Hearings on H.R. 14931*, *supra* note 3, at 282.

<sup>115</sup> S. REP. NO. 1124, 91st Cong., 2d Sess. 15-16 (1970).

<sup>116</sup> See S. 3201, Commerce Comm. Print, *supra* note 105, § 206(b).

<sup>117</sup> See 116 CONG. REC. S13,457 (daily ed. Aug. 14, 1970).

<sup>118</sup> See, e.g., Statement on S. 3201 by Richard W. McLaren, Assistant Attorney General, Antitrust Division, before the Senate Judiciary Committee, Aug. 27, 1970.

<sup>119</sup> 116 Cong. Rec. S17,085 (daily ed. Oct. 5, 1970).

Consumers' efforts to obtain legislative redress against unfair trade practices have not stopped at demands for the right to appear before government agencies and the right to sue on their own behalf. There is also a growing demand for legislation intended to require suppliers to compete more in terms of price, quality, and service. Some bills would require disclosure of what consumer activists consider to be relevant facts for making the best buy. Other proposals are directed at making specific products safer, and still others are aimed at controlling specific market practices. Specifically, the subject matter ranges from measures requiring the federal inspection of motor vehicles,<sup>120</sup> the recalling of defective tires,<sup>121</sup> and the disclosure of gasoline specifications<sup>122</sup> to bills which would provide for licensing of auto mechanics,<sup>123</sup> governmentally endorsed testing standards and product specifications,<sup>124</sup> unit pricing of packaged consumer commodities,<sup>125</sup> and the right to rescind high-pressured door-to-door sales.<sup>126</sup>

The proposal which appears to have the most chance for success this year is the Moss-Magnuson Guaranty Bill.<sup>127</sup> It offers protection to the consumers against manufacturers who have provided misleading warranties containing incomplete or deceptive information. Suppliers would be required to make clear and conspicuous disclosure of the warranty terms and include instructions on what to do if the product becomes defective.<sup>128</sup> In this way, a consumer would gain a better understanding of the metes and bounds of the various warranties. Assuming that buyers will in part base their purchasing decisions on the type of warranty being offered, the proposed legislation could help answer part of the consumer demand that competition be based on price, quality, and service.<sup>129</sup> In addi-

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<sup>120</sup> H.R. 15262, 91st Cong., 1st Sess. (1969).

<sup>121</sup> S. 1957, 91st Cong., 1st Sess. (1969).

<sup>122</sup> H.R. 6491, 91st Cong., 1st Sess. (1969).

<sup>123</sup> H.R. 8161, 91st Cong., 1st Sess. (1969).

<sup>124</sup> S. 3286, 91st Cong., 1st Sess. (1969); H.R. 15229, 91st Cong., 1st Sess. (1969).

<sup>125</sup> S. 3752, 91st Cong., 2d Sess. (1970); H.R. 11549, 91st Cong., 1st Sess.; S. 1424, 91st Cong., 1st Sess. (1969).

<sup>126</sup> H.R. 9289, 91st Cong., 1st Sess. (1969). For an example of the FTC's belated action in this area, see text accompanying note 69 *supra*.

<sup>127</sup> S. 3074, 91st Cong., 2d Sess. (1969).

<sup>128</sup> *Id.* § 3(a).

<sup>129</sup> See S. REP. NO. 876, 91st Cong., 2d Sess. 5 (1970), in which the Senate Commerce Committee concluded:

Only when the rules of the warranty game are clarified so that the consumer can look to the warranty duration of a guaranteed product as an indicator of product reliability will consumers be able to differentiate between reliable and

tion to the above requirements, the bill would require that only guarantees which provide for full parts and services in the event of defects or malfunctions may be labeled as "full" guarantees;<sup>130</sup> all other guarantees must be clearly labeled as "partial" guarantees.<sup>131</sup> The bill would also do away with disclaimers of implied warranties where an express warranty is given to the consumer.<sup>132</sup>

To implement this legislation, the FTC would be given broad rulemaking authority to regulate the manner in which manufacturers are to inform consumers of the terms and conditions of their guarantees.<sup>133</sup> Those who fail to comply with the regulations promulgated by the FTC or with the specific requirements of the bill face no less than three suits. Two are government actions: the FTC may issue cease and desist orders, and the Attorney General may seek injunctive relief in a federal district court.<sup>134</sup> More significantly, consumers may bring private actions in any state or federal court.<sup>135</sup> The latter provision has caused a great deal of debate. As presently drafted, the bill would require consumer actions in federal court to meet the jurisdictional requirements of section 1331 of the Judicial Code.<sup>136</sup> However, under the alternative of bringing actions in state courts, the jurisdictional obstacles would be less formidable in those states having liberal class action rules.<sup>137</sup>

The Moss-Magnuson bill has passed the Senate<sup>138</sup> and is presently before the House Committee on Interstate and Foreign Commerce, where hearings have been held. Although there could be consider-

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less reliable products with the result that economic rewards from increased sales and reduced service costs will accrue to the producer of more reliable products.

<sup>130</sup> S. 3074, 91st Cong., 2d Sess. § 4(a)(1) (1970).

<sup>131</sup> *Id.* § 4(a)(2).

<sup>132</sup> *Id.* § 9(a). The term of the implied warranty, however, could be limited to the period of an express warranty. *Id.* § 9(b).

<sup>133</sup> *Id.* §§ 3(b), 5(d)(2), 10.

<sup>134</sup> *Id.* §§ 11(b)-(c) (1).

<sup>135</sup> *Id.* § 11(e).

<sup>136</sup> 28 U.S.C. § 1331 (1964), which provides in part:

The federal district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States. *Id.* § 1331(a).

<sup>137</sup> Illinois is an example of those States which have adequate consumer class action procedures. *Hearings on S. 1980*, 91st Cong., 1st Sess. (1969). Although Illinois has no specific statutory provision for class actions, they are impliedly recognized by statute [ILL. ANN. STAT. ch. 110, § 52.1 (Smith-Hurd 1968)] and by case law [*Smyth v. Kaspar Am. State Bank*, 9 Ill. 2d 27, 139 N.E.2d 796 (1956)]. *Hearings on S. 3201*, *supra* note 111, at 431.

<sup>138</sup> 116 CONG. REC. S10,507-09, S10,514-22 (daily ed. July 1, 1970).



able changes made before it is enacted, it would seem at this juncture that the bill has a good chance for passage this year.

## V. CONCLUSION

Clearly, it can be seen that the relationship between consumerism and antitrust goes well beyond the traditional antitrust concepts enunciated by Senator Hart,<sup>139</sup> and evidenced by the consumer treble damage actions which are pending.<sup>140</sup> Consumer spokesmen who believe that there has been a general breakdown in market competition, to the detriment of the consumer, are demanding means to obtain the kinds of marketing which will allow for better product choice. To some extent they may be obtaining greater relief from the Federal Trade Commission. On the other hand, it seems clear that this will not satisfy them, and we can expect more vigorous and perhaps successful consumer activity in both federal and state legislatures.

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<sup>139</sup> See text accompanying notes 5-7 *supra*.

<sup>140</sup> See notes 21-28 *supra* & accompanying text.